RECENT DECISIONS.

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BANKRUPTCY—SURETY'S CLAIM AGAINST BANKRUPT AS COLLATERAL—PROVABILITY BY CREDITOR.—A creditor who had sold goods to the bankrupt, for the purchase price of which a third person became surety, afterwards received from the surety, as security, a note of the bankrupt arising from a separate transaction. *Held,* the creditor was entitled to prove in full on both claims. *In re H. V. Keep Shirt Co.* (D. C., S. D. N. Y. 1912) 200 Fed. 80.

Under the Bankruptcy Act of 1898, a creditor who holds security upon property of the bankrupt which is assignable under the Act, or to whom a surety himself holding such security is secondarily liable, will be permitted to prove only for the excess of his claim over the value of the security. Bankruptcy Act § 57 *e, h;* Collier, Bankruptcy (9th ed.) 721; *In re Little* (1901) 110 Fed. 621. A creditor holding security upon the property of a third party, but not coming within the above defined class, is not, however, a "secured creditor" under the Act; Bankruptcy Act, § 1 (23); Collier, Bankruptcy (9th ed.) 12; and it is well settled that such a creditor is entitled to prove for the full amount of his claim. *In re Noyes Bros.* (1903) 127 Fed. 286; *Swarts* v. *Fourth Nat. Bank* (1902) 117 Fed. 1; Collier, Bankruptcy (9th ed.) 724. Although there appears to be no previous authority for the proposition, it seems clear that in the principal case the mere fact that the collateral given by the surety happened to be a claim against the bankrupt would not make it security "upon the property of the bankrupt" and that the case, therefore, was correctly decided. This holding does not prejudice the other creditors; for the aggregate amount which it permits the claimant to prove is precisely the same as the sum which he and the surety together might have proved had the security never been given. The net result of permitting only a smaller proof would have been to benefit the other creditors at the expense, possibly, see 13 COLUMBIA LAW REVIEW 71, of the surety, and there would seem to be no reason why the surety should be so penalized for having given security for his obligation.

CARRIERS—LIMITATION OF LIABILITY.—A shipper made a special contract with a carrier, agreeing, in consideration of reduced rates for transportation of his mules, that the amount recoverable in case of loss should be governed by the value of the animals at the place and date of shipment, and should not exceed $100 per head. *Held,* two judges dissenting, the stipulation was void. *J. M. Pace Mule Co.* v. *Seaboard Air Line Ry.* Co. (N. C. 1912) 76 S. E. 513. See Notes, p. 249.

CONFLICT OF LAWS—DIVORCE UPON SERVICE BY PUBLICATION—EXTRA-TERRITORIAL VALIDITY.—A husband, having been abandoned by his wife, obtained a decree of divorce upon service by publication in Virginia, the last matrimonial domicile of the parties. To a suit for maintenance by the wife in the District of Columbia the husband pleaded the Virginia decree. *Held,* the Virginia decree, being entitled to full faith and credit under the Federal Constitution, was a good defense. *Thompson* v. *Thompson* (U. S. Sup. Ct. Jan 6, 1913). Not yet reported.

A wife, upon service by publication, secured a decree of divorce in Virginia on the ground of abandonment, and later, in New York, where the husband had remarried, she sued again for divorce on the ground of adultery. *Held,* she was estopped to deny the validity of the Virginia decree. *Simmonds* v. *Simmonds* (1912) 138 N. Y. Supp. 639. See Notes, p. 241.

CONFLICT OF LAWS—EQUITABLE CONVERSION—RULE AGAINST PERPETUITIES.—In order to validate a conveyance of land in trust, which was invalid under the New York rule against perpetuities, the grantees claimed that the land had been converted into personalty by the direction to sell contained in the deed, and that the validity of the conveyance was therefore to be determined by the law of the domicile of the grantor, under the rules of which the deed would be sustained. *Held,* assuming the conversion to have been effected, the law of New York nevertheless controlled, since the trust might be administered there. *Peabody et al.* v. *Kent et al.* (1912) 138 N. Y. Supp. 32. See Notes, p. 243.

CONFLICT OF LAWS—MARRIAGE—EXTRA-TERRITORIAL EFFECT OF STATUTE RESTRICTING MARRIAGE AFTER DIVORCE.—An Illinois statute declared void remarriage by a divorced person within a year after divorce. The plaintiff, domiciled in Illinois, was divorced and within a year married in Missouri a woman also domiciled in Illinois. Upon the latter's death intestate, he claimed a husband's interest in her estate. *Held,* the marriage was invalid and the plaintiff's claim must be denied. *Wilson* v. *Cook* (Ill. 1912) 100 N. E. 222.

Although the marriage relation may take its inception elsewhere, the fact that the contract is to be executed where the parties are domiciled has prevented an absolute adherence to the rule that the validity of marriages is to be determined by the *lex loci contractus.* See *Pennegar* v. *State* (1888) 87 Tenn. 244; 1 Wharton, Confl. Laws (3rd ed.) §135*a*. The most familiar exception is that incestuous and polygamous marriages will be denied validity in the courts of the domicile as being repugnant to the law of nature. Story, Confl. Laws (8th ed.) §114; see *Hutchins* v. *Kimmell* (1875) 31 Mich. 126, 134. But it is equally well settled that a State may by express legislative provision declare invalid marriages contracted in foreign States by its own citizens in disregard of its statutes. *Roth* v. *Roth* (1882) 104 Ill. 35; *State* v. *Shattuck* (1897) 69 Vt. 403; Story, Confl. Laws (8th ed.) §124*a*. This right being clear the question whether a broad general prohibition such as is involved in the principal case is such a declaration, is solely a question of legislative intention. Where the provision against remarriage is aimed at the guilty party as a penalty for misconduct, the weight of actual decision accords with sound principles of the construction of penal statutes in denying it extra-territorial effect although the parties have gone to a neighboring State for the express purpose of evading the provision. *Van Voohris* v. *Brintnall* (1881) 86 N. Y. 18; *Willey* v. *Willey* (1900) 22 Wash. 115; *contra, Pennegar* v. *State supra.* Even where, as in the principal case, the prohibition is clearly not a penalty, the same result should follow, since the dangerous power of invalidating marriages should not be exercised through judicial implication of legislative intention based upon the supposed public policy of the forum. *Estate of Wood* (1902) 137 Cal. 129; *Dudley* v. *Dudley* (1911) 151 Ia. 142.

CONSTITUTIONAL LAW—SEPARATION OF POWERS—EXERCISE OF JUDICIAL FUNCTIONS BY ADMINISTRATIVE BOARD.—The prisoner was convicted of forgery and sentenced to the reformatory. Subsequently, the State Board of Control, authorized by a statute in existence at the time of the prisoner's conviction and sentence, transferred him to the penitentiary. *Held,* the statute was constitutional. *State ex rel. Kelly* v. *Wolfer, Warden* (Minn. 1912) 138 N. W. 315.

The objection usually interposed to such legislation as that in the principal case is that it authorizes an administrative board to alter judicial sentences. See *In re Cassidy* (1880) 13 R. I. 143. The prevailing view, however, is that the legislature by virtue of its power to prescribe punishment for crime may affix such conditions as it sees fit to its execution, *State* v. *Page* (1899) 60 Kan. 664, and these are deemed to be incorporated in the sentence of the court. *In re Murphy* (1901) 62 Kan. 422; *Rich* v. *Chamberlain* (1895) 104 Mich. 436. The logical conclusion of this reasoning would justify any restriction which the legislature, under this pretense, might impose upon the judiciary. See *Comm.* v. *Halloway* (1862) 42 Pa. 446. The sounder doctrine is that the transfer is merely an act of discipline rendered necessary by the modern conception of punishment. *In re Linden* (1902) 112 Wis. 523. More particularly, it is objected that the statute permits ministerial officers by the imposition of an infamous punishment to deprive the prisoner of his civil rights without the judgment of a court of record. *People* v. *Mallary* (1902) 195 Ill. 582; *In re Dumford* (1898) 7 Kan. App. 89. However, it is not the actual punishment, but the conviction which so attaints the accused; *Ex parte Wilson* (1884) 114 U. S. 417; *Ex parte M'Clusky* (1889) 40 Fed. 71; the true criterion is whether the crime committed is one for which the court is authorized to inflict an infamous punishment. *State* v. *Clark* (1899) 60 Kan. 450; *cf. People* v. *Mallary supra.* Since in the principal case the prisoner was guilty of such a crime it cannot be said that the transfer abridged his civil rights.

CONTRACTS—CONTRACT FOR PERSONAL SERVICES TERMINATED BY DEATH —RECOVERY IN QUASI-CONTRACT.—An attorney who had undertaken, upon a contingent fee, to prosecute a claim against a railroad company, died before the case came to trial. The railroad company then settled directly with the claimant, and the attorney's administratrix sued for the contingent share. *Held,* she could recover. *Sargent* v. *McLeod et al.* (1913) 139 N. Y. Supp. 666.

In entire contracts complete performance not only constitutes a specific promise, but it is also a condition precedent to recovery by the promisor. *Appleby* v. *Dods* (1807) 8 East 300. In contracts for personal services, however, the promise is subject to an implied condition that the promisor shall be able to perform the contract, *Spalding* v. *Rosa* (1877) 71 N. Y. 40; *Smith* v. *Preston* (1897) 170 Ill. 179; *Robinson* v. *Davison* (1871) L. R. 6 Ex. 269, and his death or disability will excuse his non-performance. *Wolfe* v. *Howes* (1859) 20 N. Y. 197. On the other hand, in the absence of a waiver nothing short of full performance will give the plaintiff a right of action upon the contract. *Superintendent* v. *Bennett* (1859) 27 N. J. L. 513. Recovery may be had, therefore, only in quasi-contract. *Landa* v. *Shook* (1895) 87 Tex. 608; *Coe* v. *Smith* (1853) 4 Ind. 79; *Wolfe* v. *Howes supra.* While the true basis of recovery then is the actual benefit accruing to the defendant from the services rendered, Keener, Quasi-Contracts, 244, the con-

tract rate would ordinarily furnish *prima facie* evidence of their worth to the defendant; *Patrick* v. *Putnam* (1855) 27 Vt. 759; *Coe* v. *Smith supra;* and in *Clark* v. *Gilbert* (1865) 26 N. Y. 279, which the principal case approves, the contract rate was, indeed, regarded as practically conclusive of the actual benefit, as it did not appear that the defendant had suffered damage by reason of the breach. It is doubtful, however, whether a contingent fee should be used in estimating damages on a *quantum meruit*. *O'Neill* v. *Crane* (1901) 65 N. Y. 358.

CORPORATIONS—VALIDITY OF DIVIDEND DECLARED BY STOCKHOLDERS.—Although the by-laws of a corporation gave the directors power to declare dividends, the stockholders, at a meeting attended by all the directors, unanimously authorized a division of earned profits. Insolvency intervened before payment and a creditor objected to the dividend claims. *Held,* the claims were provable. *Spencer* v. *Lowe* (C. C. A., 8th Circ. 1912) 198 Fed. 961.

It is often claimed, from the customary recital in the by-laws, that the authority of corporate directors to declare dividends is exclusive. *American Wire Nail Co.* v. *Gedge* (1895) 96 N. Y. 513; see *Shelby* v. *New York Steam Co.* (1910) 121 N. Y. Supp. 619. If it is true, as is asserted by a considerable body of opinion, that the directors derive original authority from the legislature through the corporate charter, see *Beveridge* v. *N. Y. El. Ry. Co.* (1889) 112 N. Y. 1, this proposition is sound; but it would seem that the directors acquire their power from the consent of the incorporators, effectuated, of course, by legislative sanction. 1 Morawetz, Corp. (2nd ed.) §515; see 2 Thompson, Corp. (2nd ed.) §§1179, 1180. Each shareholder has, therefore, bargained for the discretion of the directors and a mere majority of stockholders cannot override the contract. *Automatic Filter Co.* v. *Cuninghame* [1906] L. R. 2 Ch. 34; see 1 Morawetz, Corp. (2nd ed.) 474, 475; 2 *id.* 641, 642. The unanimous act of the shareholders, seems, however, to be a corporate act, as the entire body of shareholders is really the corporation and includes all the parties to the primary contract. See *Thomas* v. *Citizens Horse Ry. Co.* (1882) 104 Ill. 462; *Eureka Works* v. *Bresnahan* (1886) 60 Mich. 332; *contra, Gashwiler* v. *Willis* (1867) 33 Cal. 11. So when all the stockholders agree to divide profits there is a corporate act; *Groh's Sons* v. *Groh* (N. Y. 1903) 80 App. Div. 85; *Central Ry. Co.* v. *Central Trust Co.* (1910) 135 Ga. 472; and creditors cannot object on a subsequent insolvency, if the dividends do not impair capital. *Maine* v. *Mills* (1874) 6 Biss. 98; see 1 Morawetz, Corp. (2nd ed.) §445; *cf. Rorke* v. *Thomas* (1874) 56 N. Y. 559.

CRIMINAL LAW—APPEAL—PRISONER'S ESCAPE AS GROUND FOR DISMISSAL.—A convicted murderer brought an appeal and after the filing of the record it appeared that he had escaped from custody. *Held,* the appeal should be dismissed. *Tate* v. *State* (Tex. 1912) 151 S. W. 541.

On the ground that an appeal is a question of law to be settled by the court upon the record and inasmuch as the defendant may appear in a criminal appeal merely by counsel, *State* v. *Overton* (1877) 77 N. C. 485, it has been held that the escape of the prisoner is a collateral matter not within the jurisdiction of the court and that it is therefore the duty of the court to proceed with the appeal to judgment. *Parsons* v. *State* (1853) 22 Ala. 50; *State* v. *Plazencia* (La. 1844) 6 Rob. 441. The opposite rule, however, now prevails everywhere. *Warwick* v. *State* (1883) 73 Ala. 486; *State* v. *Wright* (1880) 32 La. Ann. 1017; *State* v.

Handy (1902) 27 Wash. 469. In the absence of such a statute as that in the principal case, see *Brown* v. *State* (1878) 5 Tex. App. 126, it seems that the question of dismissal rests properly in the discretion of the court, *State* v. *Jacobs* (1890) 107 N. C. 772; *McGowan* v. *People* (1882) 104 Ill. 100; but see *People* v. *Redinger* (1880) 55 Cal. 290, for it is not recognized as error for the appeal to have been heard after the escape of the prisoner. *State* v. *Jacobs supra; Leftwich* v. *Comm.* (Va. 1870) 20 Gratt. 716. It would follow that the appeal is dismissed not because a judicial criminal proceeding requires that the accused be within the control of the court, *People* v. *Genet* (1874) 59 N. Y. 80, but because public policy demands that the privileges of a prisoner shall not be preserved after his escape. *Territory* v. *Trinkhouse* (1887) 4 N. M. 158; see *Smith* v. *United States* (1876) 94 U. S. 97. This demand is fully satisfied by a suspension of the appeal for a reasonable time, *State* v. *McMillan* (1886) 94 N. C. 945, which seems more just than a complete dismissal, either immediately, *Sargent* v. *State* (1884) 96 Ind. 63, or after a short fixed period, *State* v. *Conners* (1882) 20 W. Va. 1.

CRIMINAL LAW—BURGLARY—KLEPTOMANIA AS A DEFENSE.—The defense of kleptomania was interposed to a charge of burglary. *Held,* a general instruction on the "right and wrong test" of insanity was sufficient. *State* v. *Riddle* (Mo. 1912) 150 S. W. 1044.

While it appears impossible to lay down any general rule for the validity of insanity as a defense to homicide, since each case presents purely a question of fact of the defendant's criminal responsibilty, *State* v. *Jones* (1871) 50 N. H. 369; see *State* v. *Felter* (1868) 25 Ia. 67; I Wharton & Stille, Med. Jur. (5th ed.) § 557, a majority of jurisdictions refuse to recognize as a defense an irresistible impulse to kill, and adopt the test of knowledge of the right and wrong of a particular act, because of a disinclination to admit such problematic evidence and open the door to fraudulent defenses. *State* v. *Pagels* (1887) 92 Mo. 300; *Flanagan* v. *People* (1873) 52 N. Y. 467. Many courts, however, have recognized the injustice of punishing a person whose will is paralyzed by disease and have consequently admitted irresistible impulse as a defense. *Parsons* v. *State* (1886) 81 Ala. 577; *Butler* v. *State* (1899) 102 Wis. 364. The test employed by the former line of authority and followed by the principal case practically ignores the defense of kleptomania which manifests itself only in the irresistible impulse to steal. I Wharton & Stille, Med. Jur. (5th ed.) § 200; 1 Bishop, New Crim. Law (8th ed.) § 388, sec. 3; see *Looney* v. *State* (1881) 10 Tex. App. 520. It is, therefore, quite natural that the jurisdictions which recognize irresistible impulse should also admit kleptomania as a defense. *State* v. *McCullough* (1901) 114 Ia. 532; see *Comm.* v. *Fritch* (1890) 9 Pa. Co. Ct. 164. Notwithstanding the similarity between irresistible impulse to kill and kleptomania, the objections urged against the recognition of the former, it is submitted, are less applicable to the latter, for proof of kleptomania may be clearly adduced by its specific manifestations, and public policy does not demand the same rigidity in cases of larceny as in homicide.

CRIMINAL LAW—CONFLICT OF LAWS—INJURY AND DEATH IN DIFFERENT JURISDICTIONS.—As a result of poison administered and blows struck by the accused in Ohio, the injured person died in Kentucky. *Held,* the Kentucky court had no jurisdiction to try the accused for the homicide. *Commonwealth* v. *Apkins* (Ky. 1912) 146 S. W. 431.

At common law, when a fatal blow was struck in one county and death occurred in another the homicide was probably indictable in neither, 7 COLUMBIA LAW REVIEW 605; 4 Bl. Com. 303; but see 1 Hale, P. C., 426, as the jury were required to find a verdict from facts of their own knowledge and they could not take notice of events in another county. 1 Bishop, New Crim. Law (8th ed.) §115 n. 2; see *Stout* v. *State* (1892) 76 Md. 317. This was sometimes avoided by bringing the body back into the county where the stroke was administered and indicting the offender there. 1 East, P. C., 361. By Stat. 2 & 3 Edw. VI. c. 24, §2, however, the offense was made indictable where the death occurred. This statute has been adopted in some States, *State* v. *Orrell* (N. C. 1826) 1 Dev. L. R. 139; *State* v. *Moore* (1853) 26 N. H. 449, and in others similar laws have been held constitutional, *Comm.* v. *Malcoon* (1869) 101 Mass. 1; *Tyler* v. *People* (1860) 8 Mich. 320; *State* v. *Pauley* (1860) 12 Wis. 599, although if, as the principal case holds, no crime has been committed in the State where the death alone occurred, it would seem that such legislation is unconstitutional, the jurisdiction of crimes being local. 1 Bishop, New Cr. Law (8th ed.) §112, sec. 4; see *State* v. *Carter* (N. J. 1859) 3 Dutch. 499. The correct view is that the only crime committed takes place in the jurisdiction in which the injury is inflicted. *United States* v. *Guiteau* (D. C. 1882) 1 Mackey 498; *Riley* v. *State* (Tenn. 1849) 9 Humph. 646; but see *United States* v. *Magill* (1806) 1 Wash. Cir. Ct. 463; *Comm.* v. *Linton* (1820) 2 Va. Cas. 205. The subsequent death is no offense against the sovereignty of the State in which it occurs, *State* v. *Carter supra; State* v. *Gessert* (1875) 21 Minn. 369, but merely determines the character of the crime. *State* v. *Bowen* (1876) 16 Kan. 475.

EVIDENCE—HUSBAND'S DEPOSITION MADE DURING COVERTURE—ADMISSIBILITY AFTER DIVORCE.—A deposition made by a husband during coverture was after divorce offered in evidence against his wife in a suit between her and a third party. *Held,* the deposition was admissible. *Howard* v. *Strode* (Mo. 1912) 146 S. W. 792.

A deposition inadmissible when made by reason of interest clearly can never become admissible even though the deponent may become a competent witness by removal of the disqualification. *Schuylkill Nav. Co.* v. *Harris* (Pa. 1842) 5 W. & S. 28; *Ellis* v. *Smith* (1851) 10 Ga. 253. Conversely, if the deposition is competent when made it is not affected by the deponent's subsequent acquirement of interest. *McMullen* v. *Ritchie* (1894) 64 Fed. 253, 266; *Sabine* v. *Strong* (Mass. 1843) 6 Metc. 270. When the question is one of interest, therefore, the competency of the deponent as a witness at the time the deposition is made determines the admissibility of the statement in any event. If untrustworthiness, then, either on account of identity of pecuniary interest or of the natural bias of affection, is the ground for barring a husband's testimony, see Wigmore, Evidence §§603, 619, a divorce would not make his deposition receivable. But in construing the statutes abolishing the interest disqualification, the courts have put the husband's incompetency not upon the ground of unreliability, but of public policy. *Lucas* v. *Brooks* (1873) 85 U. S. 436, 453; *Mitchinson* v. *Cross* (1871) 58 Ill. 366; *Turpin* v. *State* (1880) 55 Md. 462, 475. Under that view it is apparent that the admissibility of a deposition should depend upon the status of the deponent as a witness at the time it was offered, and not when made. When, therefore, the husband has become a competent witness for or against the wife upon

the dissolution of the marriage by death or by divorce, *Parcell* v. *McReynolds* (1887) 71 Ia. 623; *Wottrich* v. *Freeman* (1877) 71 N. Y. 60, his deposition, though made during coverture, should be admitted. But see *Cameron* v. *Cameron* (1862) 15 Wis. 1.

EXECUTORS AND ADMINISTRATORS—SALE OF DECEDENT'S ESTATE—PERSONAL LIABILITY ON WARRANTY.—The vendee of land conveyed by executors sought to hold them personally liable for breach of a warranty given by them "as executors." *Held,* one judge dissenting, they were not liable. *Ivey* v. *Vaughn* (S. C. 1912) 76 S. E. 464.

It is well settled that, in order to prevent loss and waste of the assets, a decedent's estate cannot be charged by the contracts of the personal representative. Note to *Schlicker* v. *Heminway* (Cal. 1895) 52 Am. St. Rep. 116; see *Thompson* v. *Mann* (1909) 65 W. Va. 648. So although the executor may sell land under a power given him, he has no authority to bind the estate by collateral warranties. *Osborne* v. *McMillan* (N. C. 1857) 5 Jones L. 109; but see *Shantz* v. *Browne* (1856) 27 Pa. St. 123. The vendee, however, may hold the executor personally liable on such covenants even though they were intended to bind the estate alone. *Lynch* v. *Kirby* (1880) 65 Ga. 279; *Mitchell* v. *Hazen* (1823) 4 Conn. 495; *Sumner* v. *Williams* (1811) 8 Mass. 162. If the instrument is under seal a technical rule of construction holds the signer personally liable upon it regardless of the capacity in which he purports to act. *Stinchfield* v. *Little* (1821) 1 Me. 231; see *Aven* v. *Beckan* (1852) 11 Ga. 1. In practically all other contracts an agent acting in excess of his authority is held liable personally upon a warranty of his authority to contract, implied by law for the protection of third parties. 10 COLUMBIA LAW REVIEW 567; *White* v. *Madison* (1862) 26 N. Y. 117. This doctrine, however questionable upon principle, is well settled and, it seems, would have justified a recovery in the principal case, especially as the vendee had been led into paying a higher price in reliance upon the covenant of warranty given. Note to *Allen* v. *Sayward* (Me. 1828) 17 Am. Dec. 224.

HUSBAND AND WIFE—ANTE-NUPTIAL SETTLEMENT—DOWER.—A wife, suing for her dower, was met by an ante-nuptial agreement whereby she had agreed to accept in lieu thereof certain property which, however, had never been conveyed to her. *Held,* she could not recover. *Gordon* v. *Munn* (Kan. 1912) 127 Pac. 764.

The impossibility of creating an ante-nuptial bar to dower at common law, 1 Cruise, Digest, 196, was remedied by Stat. 27 Hen. VIII, c. 10, which provided a means of effecting that result by a jointure fulfilling certain strict legal requirements. 2 Bl. Com. 137; 2 Scribner, Dower (2nd ed.) 390 *et seq.* Equity, however, recognized ante-nuptial agreements, which were not strictly legal jointures, and enforced them in lieu of dower according to the intention of the parties. *Cummings* v. *Cummings* (1904) 25 R. I. 528; *Kennedy* v. *Kennedy* (1898) 150 Ind. 636. When such an agreement is interposed as a bar to the widow's claim for dower some chancery courts treat it merely as an equitable bar and enforce it provided it was entered into freely and with complete understanding. *Naill* v. *Maurer* (1866) 25 Md. 532; see *Forwood* v. *Forwood* (1887) 86 Ky. 114. Other courts go into the adequacy of the consideration as if the defense were an invocation for specific performance and will presume fraud if the provision for the wife seems inadequate. *Spurlock* v. *Brown*

(1891) 91 Tenn. 241; *Pierce* v. *Pierce* (1877) 71 N. Y. 154; see *Russell* v. *Russell* (1904) 129 Fed. 434. The former view seems preferable, as giving proper emphasis to marriage as consideration. *Fisher* v. *Koontz* (1900) 110 Ia. 498; see *Magniac* v. *Thompson* (1833) 32 U. S. 348. Since part of the consideration has passed at the time of marriage, therefore, it would seem that no condition of performance by the husband should be implied unless the parties so intended. *North* v. *Ansell* (1731) 2 P. Wms. 618; *Jeston* v. *Key* (1871) L. R. 6 Ch. App. 610; see *Buffington* v. *Buffington* (1898) 151 Ind. 200; *contra, Gibson* v. *Gibson* (1818) 15 Mass. 106. Where, then, the agreement is not considered inequitable it should be sustained, as in the principal case, notwithstanding the husband's non-performance.

INSURANCE—JUDGMENT AGAINST ASSURED—LIABILITY OF INSURER AS GARNISHEE.—A casualty insurance policy provided that the company should take sole charge of the defense in actions against the assured, but that no action should lie against the company on the policy except as indemnity for money actually paid by the assured after trial. The plaintiff recovered a judgment which was, however, not satisfied, on account of the assured's insolvency. *Held,* the company was liable, as garnishee, to the plaintiff. *Patterson* v. *Adan* (*Phila. Casualty Co. et al., garnishees.*) (Minn. 1912) 138 N. W. 281.

An insurer whose liability to the assured is at the time contingent cannot be held as garnishee by the latter's creditor. *Gies* v. *Bechtner* (1867) 12 Minn. 279. The decision in the principal case, although recognizing the distinction between contracts of indemnity against loss and those of insurance against liability, see *Finlay* v. *Casualty Co.* (1904) 113 Tenn. 592, construes the policy as a contract of insurance against liability, payable immediately upon ascertaining the amount due on the judgment. This construction has the support of one decision, *Sanders* v. *Insurance Co.* (1904) 72 N. H. 485, but is opposed to the great weight of authority. *Connolly* v. *Bolster* (1905) 187 Mass. 266; *Traveler's Ins. Co.* v. *Moses* (1901) 63 N. J. Eq. 260; *Frye* v. *Bath Gas Co.* (1903) 97 Me. 241. Despite the rule that an ambiguous insurance policy should be construed against the insurer, *Kratzenstein* v. *Western Assurance Co.* (1889) 116 N. Y. 54, it seems that the majority view is justified by the express wording of the condition. *Allen* v. *Aetna Life Ins. Co.* (1906) 145 Fed. 881. The argument that under any other construction the insurer would be an officious intermeddler in defending an action in which the assured was primarily liable, upon which the opinion seems chiefly to rely, has not been considered in any of the previous cases arising on identical facts, and seems unsound, since the insurance company has sufficient interest in the result to justify its interference in the litigation. See *Gilman* v. *Jones* (1888) 87 Ala. 691.

LANDLORD AND TENANT—SURRENDER—RECOVERY BY LANDLORD FROM SUB-TENANT.—A landlord, after his tenant had surrendered the lease, brought an action for use and occupation against a sub-tenant, who had continued on under the terms of his sub-lease. *Held,* he could not recover. *Buttner* v. *Kasser* (Cal. 1912) 127 Pac. 811. See Notes, p. 245.

LIBEL AND SLANDER—PRIVILEGED COMMUNICATION—JUDICIAL PROCEEDINGS.—The plaintiff was a witness before a committee of the Senate engaged in investigating the fitness of a candidate for office whose ap-

pointment was before the Senate for confirmation. The defendant, acting in good faith, sent an affidavit to the committee containing criminatory matter concerning the plaintiff, which was not, however, relevant. *Held,* the plaintiff could not recover, as the affidavit was conditionally privileged. *Tuohy* v. *Halsell* (Okla. 1912) 128 Pac. 126.

A communication made by one on a subject in relation to which he has an interest or a moral duty, to another having a corresponding interest or duty is conditionally privileged, *Klinck* v. *Colby* (1871) 46 N. Y. 427; *Caldwell* v. *Story* (1899) 107 Ky. 10, but it is submitted that this principle should not apply where the communication is irrelevant to the occasion, even though the occasion is privileged. *Hines* v. *Shumaker* (1911) 97 Miss. 669; *Blakeslee* v. *Carroll* (1894) 64 Conn. 223, 238. In the course of judicial proceedings, however, even irrelevant statements are at least conditionally privileged. *Myers* v. *Hodges* (1907) 53 Fla. 197; *Lawson* v. *Hicks* (1862) 38 Ala. 279; see *Hoar* v. *Wood* (1841) 44 Mass. 193. But it seems difficult to apply the term "judicial" to proceedings of a committee which has neither the power nor the intention to determine the rights of anyone, but which is merely attempting to inform the Senate so that the latter may be able to exercise intelligently the absolute discretion vested in it. *Blakeslee* v. *Carroll supra,* 284; *contra, Sheppard* v. *Bryant* (1906) 191 Mass. 591. The principal case, however, may be supported upon the broad language of the Oklahoma Code, which declares privileged a publication made "in any legislative or judicial proceeding, or any other proceeding authorized by law." Wilson Rev. & Ann. Stat. (1903) §2239.

MANDAMUS—ANTICIPATED BREACH OF DUTY.—The petitioners sought to obtain a writ of mandamus directing an election board to accept for filing a certificate of independent nominations. The time for filing certificates had not arrived, but a member of the board had stated that the petitioners' certificate would not be accepted. *Held,* the proceeding was not premature. *People ex rel. Hotchkiss et al.* v. *Smith et al.* (N. Y. 1912) 99 N. E. 568.

For a discussion of the principles involved see 12 COLUMBIA LAW REVIEW 175.

MASTER AND SERVANT— PARENT'S LIABILITY FOR SON'S NEGLIGENCE IN DRIVING AUTOMOBILE.—The defendant gave his eighteen year old son general permission to use his automobile. Owing to the son's negligence in driving the car the plaintiff's intestate was struck and fatally injured. *Held,* the defendant was not liable. *Parker* v. *Wilson* (Ala. 1912) 60 So. 150.

A parent is not liable for the torts of his minor children upon the mere ground of relationship. *Kumba* v. *Gilham* (1899) 103 Wis. 312. If recovery is to be had against the parent, therefore, it must be either upon proof that the child, in operating the car at the time of the injury, was acting as his agent, *Smith* v. *Jordan* (1912) 211 Mass. 269; *Lashbrook* v. *Patton* (Ky. 1864) 1 Duv. 316, or upon the distinct theory that the parent was negligent in that he had intrusted his property to an incompetent or reckless person. *Meers* v. *McDowell* (1901) 110 Ky. 926; see *Palm* v. *Ivorson* (1905) 117 Ill. App. 535. Upon the first point, the fact that the parent had intended an automobile for the use of the family, and that with his consent it was being driven by the minor for that purpose at the time of the accident, has been held, in a few cases, sufficient to establish the relation of agency. *Stowe* v.

Morris (1912) 147 Ky. 386; see *Daly* v. *Maxwell* (1911) 152 Mo. App. 415; *cf. Lashbrook* v. *Patton supra.* This view, however, as shown in the principal case, would undoubtedly lead to absurd results and is opposed to the decided weight of authority. *Doran* v. *Thomsen* (1908) 76 N. J. L. 754; *Maher* v. *Benedict* (1908) 108 N. Y. Supp. 228. Upon the second point, proof that the minor was in fact a person incapable of safely driving a car might often be available; but since the automobile is not dangerous *per se, Cunningham* v. *Castle* (1908) 127 App. Div. 580, the mere fact of the son's minority would not seem to establish his incompetency and would therefore afford no proof of the father's negligence.

MORTGAGES—FIXTURES ANNEXED BY MORTGAGOR'S TENANT—RIGHTS OF MORTGAGEE.—A mortgagor leased the mortgaged premises, stipulating that the tenant might remove any trade buildings erected thereon by him. Before foreclosure the mortgagee sought to enjoin the tenant from removing such buildings. *Held,* the injunction should he refused. *Equitable Guarantee & Trust Co.* v. *Hukill* (Del. 1912) 85 Atl. 60. See Notes, p. 247.

MORTGAGES—TRANSFER OF EQUITY OF REDEMPTION—DISCHARGE OF MORTGAGOR AS SURETY.—The purchaser of land subject to two mortgages, the payment of which he had not assumed, entered into an agreement with the first and second mortgagees by which the amount of the first mortgage was increased. *Held,* the mortgagor was discharged only to the extent of the increase. *Union Bank of Brooklyn* v. *Rubenstein* (1912) 138 N. Y. Supp. 64. See Notes, p. 238.

MUTUAL BENEFIT ASSOCIATIONS—CHANGE OF BENEFICIARY—FAILURE TO CONFORM WITH BY-LAWS.—A member of a mutual benefit society, having gratuitously appointed his sister, a friend and his estate beneficiaries, agreed upon a compromise of the claims of his divorced wife for alimony, to name his minor children beneficiaries instead. He made no effort to conform to the prescribed mode of changing appointees, and upon his death the adverse claimants were interpleaded by the society. *Held,* the original beneficiaries were entitled to the insurance money. *Faubel* v. *Eckhart* (Wis. 1912) 138 N. W. 615.

Unlike the vested right of a beneficiary of a regular life insurance policy, the interest of the appointee in a mutual benefit certificate is ambulatory. 12 COLUMBIA LAW REVIEW 551. In order, however, to give a new beneficiary a claim which the society cannot impeach, the assured must comply with the regulations of the company, *McCarthy* v. *New Eng. Order* (1891) 153 Mass. 314; *Kemper* v. *Modern Woodmen* (1904) 70 Kan. 119, unless a strict compliance is impossible, when a substantial effort will suffice. *Supreme Conclave* v. *Cappella* (1890) 41 Fed. 1; *Luhrs* v. *Luhrs* (1890) 123 N. Y. 367; *Grand Lodge* v. *Child* (1888) 70 Mich. 163. But since these rules are promulgated primarily for the protection of the society it may waive compliance, and the original beneficiary, who has no vested interest, cannot object. *Shoenau* v. *Grand Lodge* (1902) 85 Minn. 349; *Manning* v. *A. O. U. W.* (1887) 86 Ky. 136. When, therefore, the society interpleads the adverse claimants, the courts have felt free to determine the case upon broad considerations of equity. *Adams* v. *Grand Lodge* (1894) 105 Cal. 321. Thus, if one has been designated a beneficiary for a consideration he will prevail over a volunteer subsequently appointed by

the insured. *Grimbly* v. *Harrold* (1899) 125 Cal. 24; *Leaf* v. *Leaf* (1891) 92 Ky. 166; *Benard* v. *Grand Lodge* (1900) 13 S. D. 132. Similarly, it seems that in the principal case the failure of the insured to comply with the rules of the company should not have defeated the rights of those equitably entitled to succeed. *Pennsylvania R. R. Co.* v. *Wolfe* (1902) 203 Pa. 269; 16 Harv. L. Rev. 67.

NEGLIGENCE—UNWHOLESOME FOOD—PACKER'S LIABILITY TO CONSUMER.—A consumer sued a packing company on account of illness caused by unwholesome canned meat, which he had purchased from a retail dealer. *Held,* on demurrer, the complaint stated a good cause of action. *Ketterer* v. *Armour & Co.* (D. C., S. D. N. Y. 1912) 200 Fed. 322.

It is usually stated as a general rule that a manufacturer is not liable to a consumer for injury due to negligence in production. Nevertheless, the contrary result has been reached in many cases, which have been rather arbitrarily grouped, as exceptions, into three classes. See *McCaffrey* v. *M. & G. Mfg. Co.* (1901) 23 R. I. 381; *Huset* v. *Case Thresh. Mach. Co.* (1903) 120 Fed. 865. The manufacturer of explosives or drugs is held on the ground that he is dealing in things inherently dangerous; *Wellington* v. *Downer Oil Co.* (1870) 104 Mass. 64; *Peters* v. *Jackson* (1902) 50 W. Va. 644; but these articles are not necessarily more dangerous than, for example, defective machinery. Again, the manufacturer is held liable where he has intentionally concealed a defect. *Kuelling* v. *Roderick Lean Mfg. Co.* (1905) 183 N. Y. 78. Finally, he is said to be responsible, though the articles be not especially dangerous, where he knows of the defect, see *Heindrick* v. *Louisville Elevator Co.* (1906) 122 Ky. 675; *O'Neill* v. *James* (1904) 138 Mich. 567, though mere knowledge would not appear to be a conclusive ground. None of these exceptions, it is evident, presents a convincing reason for departure from what is commonly called the general rule. Rather, it seems, a safe conclusion to be deduced from the cases is that there is an increasing tendency to hold the manufacturer liable to the consumer for the natural and probable results of his negligence, though the principal case is not necessarily illustrative of this, since upon authority the defendant was liable upon the same theory as are the manufacturers of drugs. *Tomlinson* v. *Armour & Co.* (1908) 75 N. J. L. 748; see *Bishop* v. *Weber* (1885) 139 Mass. 411; *contra, Nelson* v. *Armour & Co.* (1905) 76 Ark. 352.

NEGOTIABLE INSTRUMENTS—BANKRUPTCY OF MAKER—ESTOPPEL OF ENDORSER TO COMPETE WITH HOLDER.—The maker of a promissory note was also indebted to the payee upon an open account. The payee endorsed the note as collateral security for a loan. The maker and the payee then both became insolvent. *Held,* in the distribution of the maker's assets the pledgee of the note was entitled to priority over the creditors of the payee, who claimed through the open account. *In re Ellington Planting Co.* (La. 1912) 67 So. 25.

The pledgee of negotiable paper acquires only the right of possession and collection from the maker, and cannot sue the pledgor upon his endorsement; he holds the paper, in effect, as agent or trustee for the debtor. *Sparks* v. *Caldwell* (1910) 157 Cal. 401; see 12 COLUMBIA LAW REVIEW 470; but see *Tarbell* v. *Sturtevant* (1854) 26 Vt. 513, 516. By the fact of the endorsement, therefore, the debtor's liability is not enlarged. But even if the endorsement for collateral security imposed

upon the debtor the liability of a surety upon the note, he would only be bound to make good the maker's default up to the amount of the pledgee's interest, since an endorser's contract is entirely distinct from that of the maker; *Mason* v. *Kilcourse* (1904) 71 N. J. L. 472; and to that extent he is already bound upon his principal obligation. It was nevertheless held in the principal case that the pledgor was under an additional duty to refrain from competing with the pledgee in the maker's funds, and that his assignee in bankruptcy was similarly estopped; and this holding has the support of *Fourth National Bank's Appeal* (1889) 123 Pa. St. 473. No such duty, however, is put upon an indorser, even by implication, in the Negotiable Instruments Law. See §§115, 116; *cf.* English Bills of Exchange Act (1882) §55, subd. 2. It seems that the more equitable result would follow from allowing the pledgee and the representative of the pledgor to prove their respective claims against the maker ratably, and then allowing the pledgee to prove against the pledgor's estate for the balance of his debt.

PARENT AND CHILD—ADOPTION—RIGHT OF PARENTS TO INHERIT FROM ADOPTED CHILD.—An adopted infant inherited property from its foster father. Upon its death without issue, the natural mother claimed title, to the exclusion of the adopting parent's children, under a statute providing that when an infant dies without issue, having title to real estate derived from one of its parents, the whole shall descend to that parent and his or her kindred. *Held,* the title passed to the adoptor's kindred. *Lanferman* v. *Vanzile* (Ky. 1912) 150 S. W. 1008.

Although an adopted child nominally assumes, in reference to the adopting parties, the position of a child born in lawful wedlock, in the absence of specific legislation the mere adoption does not divest the child of the right to inherit from its natural parents. *Wagner* v. *Varner* (1879) 50 Ia. 532; but see Gen. Stat. of Conn. (Rev. 1902) § 234. Moreover, the one adopted can also inherit from or through the foster parents. *Pace* v. *Klink* (1874) 51 Ga. 220; *Batchelder* v. *Walworth* (Vt. 1912) 82 Atl. 7; but see *Delano* v. *Bruerton* (1889) 148 Mass. 619. The courts, however, deny the right of the adoptors to take, as parents under the general laws of descent, any property which the child acquired from its natural ancestors either by inheritance, *Hole* v. *Robbins* (1881) 53 Wis. 514, or by other method during his life. *Upson* v. *Noble* (1880) 35 Oh. St. 655. In such cases the natural parents succeed, by a stringent application of the doctrine that the inheritance is confined to the blood. A different rule seems to have been applied whenever the one adopted derives his title, because of his position as lawful heir or child, from the estate of a foster parent. The natural parents are then given no right of inheritance and the property passes to the kindred of the adoptor. *Humphries* v. *Davis* (1884) 100 Ind. 274; see *Swick* v. *Coleman* (1905) 218 Ill. 33. The principal case was correctly decided under this principle.

PUBLIC SERVICE COMPANIES—TELEGRAPHS—DUTY TO NOTIFY SENDER OF DELAY.—The sendee of an important telegram was not at the place of address. The receiving office, having agreed to mail telegrams to him, forwarded the one in question on the day following its receipt, without notifying the sender of the impending delay. *Held,* the sender, being entitled to notice, could recover damages caused by the delay in delivery. *Sturtevant* v. *Western Union Telegraph Co.* (Me. 1912) 84 Atl. 998.

It has been held that certain causes of delay are contemplated by the sender, and the company is, therefore, not liable for failure to notify him when such delay is impending. *Tel. Co.* v. *Henderson* (1889) 89 Ala. 510; *Stevenson* v. *Montreal Tel. Co.* (1857) 16 Upper Can. Q. B. 530; see 12 COLUMBIA LAW REVIEW 178. The preferable view, however, is that no delays are contemplated, and the modern tendency is to consider the company's failure to notify of impending delay either as a breach of its duty to inform the sender of the impossibility of performing the contract, *Swan* v. *Tel. Co.* (1904) 129 Fed. 318, or as a failure to exercise the diligence required of it in delivery, *Hendricks* v. *Tel. Co.* (1900) 126 N. C. 304; *Lyles* v. *Tel. Co.* (1906) 77 S. C. 174; *Tel. Co.* v. *Harris* (1909) 91 Ark. 602, although this question is sometimes left to the jury. *Tel. Co.* v. *Davis* (Tex. 1899) 51 S. W. 258. The sender is entitled to notice, whether the delay was known to the company at the time the message was tendered, *Fleischner* v. *Pac. Postal Tel. Cable Co.* (1893) 55 Fed. 738, or, as in the principal case, was later discovered by the receiving agent. *Bryan* v. *Tel. Co.* (1903) 133 N. C. 603. It would seem clear that any arrangement between the sendee and the company cannot affect the latter's liability to the sender, *Brashears* v. *Tel. Co.* (1891) 45 Mo. App. 433, and the principal case, therefore, is in accord with the weight of modern authority.

QUASI-CONTRACTS—RECOVERY OF ILLEGAL ASSESSMENT AFTER DISBURSEMENT.—A taxpayer sued a municipality, in an action for money had and received, to recover the amount of an illegal special assessment, which he had paid to the city under protest. The city had already paid over the money to the contractor in charge of the improvement. *Held,* the plaintiff could not recover. *Marine Co.* v. *City of Milwaukee* (Wis. 1912) 138 N. W. 640.

As a general rule, state or municipal taxes illegally collected by a county and paid over to the State or to a municipality cannot be recovered from the county in an action for money had and received, *Price* v. *Lancaster County* (1885) 18 Neb. 199; *Cleveland Ry. Co.* v. *Board of Comm'rs.* (1898) 19 Ind. App. 58; *cf. Meacham* v. *Newport* (1898) 70 Vt. 264, as the county is considered an agent for collection and therefore, upon general principles of agency, not liable after payment to the principal without notice. Story, Agency (8th ed.) §300. The same rule is generally applied when an illegal special assessment is involved, the county being regarded as agent for the contractors or commissioners in charge of the improvement. *Dewey* v. *Supervisors* (1875) 62 N. Y. 294. At times, however, it has been denied that such agency exists. *Tallant* v. *City of Burlington* (1874) 39 Ia. 543. It would then follow that the right of recovery accruing upon payment of an illegal assessment would not be lost by a subsequent disbursement of the funds by the county or municipality. *Byles* v. *Golden Township* (1884) 52 Mich. 612; *Montgomery* v. *Cowlitz County* (1896) 14 Wash. 230; see *Londen* v. *East Saginaw* (1879) 41 Mich. 18. But this, certainly, is not the usual view; and unless the case can fairly be brought within the principle that an agent is liable for money obtained from another by extortion even though he has paid it over to his principal, Mechem, Agency, §564; *Frye* v. *Lockwood* (N. Y. 1825) 4 Cow. 454; *Bocchino* v. *Cook* (1902) 67 N. J. L. 467, the decision of the court seems clearly sound.

REAL PROPERTY—RIPARIAN RIGHTS—RAILROAD RIGHT OF WAY.—In condemnation proceedings against railroad property, acquired by grant in fee and used solely for a right of way, the company claimed compensation for loss of riparian rights. *Held,* riparian rights were not incident to the property. *In re City of Buffalo* (N. Y. 1912) 99 N. E. 850.

The common law doctrine of the inalienability of riparian rights has been modified in several of the States of this country; see *Hanford* v. *St. Paul & Duluth Ry. Co.* (1889) 43 Minn. 104; and it has been held that riparian rights may be severed from the estate to which they are naturally incident and attached to non-riparian land, *Northern Pacific Ry. Co.* v. *Scott Lumber Co.* (1898) 73 Minn. 25; *contra, Stockport Water Works Co.* v. *Potter* (1864) 3 H. & C. 300; *Ormerod* v. *Todmorden Mill Co.* (1883) 11 Q. B. D. 155, that the rights of wharfage and reclamation are assignable in gross, *Welch* v. *O. R. & N. Co.* (1899) 34 Ore. 447; *Bradshaw* v. *Imperial Duluth Mill Co.* (1892) 52 Minn. 59; *contra, Lake Superior Land Co.* v. *Emerson* (1888) 38 Minn. 406, and that riparian rights in general, independently of the riparian estate, are a proper subject of condemnation. *Simmons* v. *Patterson* (1899) 60 N. J. Eq. 385; see note to *State ex rel. Burrows* v. *Superior Court* (Wash. 1908) 17 L. R. A. [N. S.] 1005. It is a natural application of this rule that a landowner in granting river-front to a railroad may entirely strip the granted land of riparian rights and reserve them as appurtenant to his remaining non-riparian estate, not only when he merely grants an easement, *New Jersey Zinc & Iron Co.* v. *Morris Canal Co.* (1888) 44 N. J. Eq. 398; but see *Hanford* v. *St. Paul & Duluth Ry Co. supra,* but even when he conveys in fee. *N. Y. C. & H. R. R. R. Co.* v. *Aldridge* (1892) 135 N. Y. 83; *cf. Colgate* v. *N. Y. C. & H. R. R. R. Co.* (N. Y. 1906) 51 Misc. 503; but see *People ex rel. Banks* v. *Colgate* (1876) 67 N. Y. 512.

SURETYSHIP—CONTRIBUTION—EFFECT OF PREVIOUS JUDGMENT.—The plaintiff, one of two sureties, having been compelled to satisfy a judgment against the principal and sureties upon their joint obligation, sued the defendant, his co-surety, for contribution. The latter pleaded that he was induced to become a surety by the fraud of the principal, a defense not set up in the original action. *Held.* the defense was not now admissible. *Eubanks* v. *Sites* (Tex. 1912) 146 S. W. 952.

A surety, who was a defendant in the original action by the principal creditor, cannot, when sued by a co-surety for contribution, deny the validity of the creditor's cause of action. *Love* v. *Gibson* (1849) 2 Fla. 598; *Cave* v. *Burns* (1844) 6 Ala. 781; *cf. Pitts* v. *Fugate* (1867) 41 Mo. 405. Whether he can set up a personal defense which would not have barred a recovery against the other parties in the original action, appears never to have been decided, but it is submitted that the same rule applies. For if the co-surety's claim for contribution rests upon subrogation to the principal creditor, see Pingrey, Suretyship (2nd ed.) § 166; *Lidderdale's Executors* v. *Executor of Robinson* (1827) 12 Wheat. 594, he is so far privy to him as to be able to count upon the defendant's liability as *res adjudicata. Rochelle* v. *Bowers* (1836) 9 La. 528; *Lloyd* v. *Barr* (1849) 11 Pa. 41. Or if the right to contribution is considered quasi-contractual, see 4 Pomeroy, Eq. Jur. (3rd ed.) § 1418; 12 COLUMBIA LAW REVIEW 751, the plaintiff's case is made out by the fact that the previous judgment rendered the defendant absolutely liable, and the plaintiff discharged that liability for him.

Waller v. *Campbell* (1854) 25 Ala. 544. Any protest that the previous judgment should not have made the defendant liable is plainly incompetent as a collateral attack. The only available defense is some equity between the two, which, without repudiating the liability, would go to the proportions of contribution. *Dent* v. *King* (1846) 1 Ga. 200; see *Cox* v. *Hill* (Oh. 1828) 3 Hammond 411.

TORTS—DECEIT—ALIENATION OF AFFECTIONS.—The plaintiff, deceived by the defendant's false representations concerning her husband, treated him so harshly and cruelly that, as the defendant intended, he deserted her. *Held,* the plaintiff could recover, as in deceit. *Work* v. *Campbell* (Cal. 1913) 128 Pac. 493.

It is now generally recognized that a wife, as well as a husband, can maintain an action for the alienation of her spouse's affections. 10 COLUMBIA LAW REVIEW 775. It may be doubted, however, whether under the facts of the principal case the plaintiff could recover on the theory of alienation of her husband's affections, see *Perry* v. *Lovejoy* (1883) 49 Mich. 529, 534, or by analogy to the tort of inducing a breach of contract, since she first withdrew her own affections and thus broke the contract herself; but see 11 COLUMBIA LAW REVIEW 691. Her participation in directly causing the damage, however, would not vitiate an action sounding in deceit, since in such case some act by the plaintiff to her own injury is an essential. Moncreiff, Fraud, 186; Bigelow, Fraud, 540. This is well exemplified in a case where the plaintiff extends credit to a third party, relying on the defendant's misrepresentations as to his solvency. See *Nevada Bank* v. *Portland Bank* (1893) 59 Fed. 338. That her act was itself wrongful, moreover, does not prevent recovery, since it was innocently committed in reliance upon the defendant's statements. 11 COLUMBIA LAW REVIEW 294; *Burrows* v. *Rhodes* [1899] L. R. 1 Q. B. 816; *Morrill* v. *Palmer* (1895) 68 Vt. 1; but see *Martachowski* v. *Orawitz* (1900) 14 Pa. Super. Ct. 175. The fact, however, that the immediate cause of the damage was the husband's act of withdrawing his affections does, to be sure, remove the damage still further from the defendant's act; *Lynch* v. *Knight* (1861) 9 H. L. C. 577; but since it was the intended result, his representations must be considered the proximate cause. Although this may be considered an extreme case the result reached by the court seems perfectly sound.

TRESPASS—BLASTING UNDER RIGHT OF EMINENT DOMAIN—DUE CARE AS DEFENSE.—The defendant, while constructing a railroad on a condemned right of way over the plaintiff's land, blasted rock so that it was cast upon the latter's adjoining property. *Held,* the exercise of due care and the removal of the rock in a reasonable time would excuse the defendant's trespass. *Gordon* v. *Elmore* (W. Va. 1912) 76 S. E. 344.

Ordinarily, due care in the use of explosives will not excuse an actual trespass, *Hay* v. *Cohoes Co.* (1849) 2 N. Y. 159, although if consequential injuries alone result such care is a defense. *Booth* v. *Rome etc. R. R. Co.* (1893) 140 N. Y. 267; *contra, Longtin* v. *Persell* (1904) 30 Mont. 306. In the principal case, however, the injury was caused by a railroad company operating on land taken from the plaintiff under the right of eminent domain, and in such cases the assessment includes all prospective damages to the landowner which may reasonably be expected to result from the prudent use of blasting

materials in the construction of the road. *Missouri K. & T. R. R. Co.* v. *Haines* (1872) 10 Kan. 439; *Dearborn* v. *R. R. Co.* (1851) 24 N. H. 179. A trespass occurring in the exercise of due care, therefore, would create no additional liability on the part of the company, *Sabin* v. *Vermont Central R. R. Co.* (1853) 25 Vt. 363; see *St. Louis I. M. & S. R. R. Co.* v. *Hanks* (1906) 80 Ark. 417, unless it affected the lands of one not a party to the original condemnation proceedings. 2 Elliott, Railroads (2nd ed.) § 1057. The company must, however, keep within the authority conferred in the proceedings. Accordingly, since no award is made for the failure to remove stones cast upon adjoining land, *Whitehouse* v. *R. R. Co.* (1863) 52 Me. 208, the defendant in the principal case would be liable for injuries resulting to such land from the non-removal of the débris within a reasonable time. *Sabin* v. *Vermont Central R. R. Co. supra; Watts* v. *Norfolk & W. R. R. Co.* (1894) 39 W. Va. 196.

WATERS AND WATER-COURSES—APPROPRIATION—PUBLIC USE.—The defendant, an irrigation company, appropriated water and built a canal for the supply of its stockholders. The plaintiff, who was not a stockholder, but who owned land in the irrigation district brought mandamus to compel delivery to him of surplus water. *Held,* the plaintiff had no right to demand service. *Thayer et al.* v. *California Development Co. et al.* (Cal. 1912) 128 Pac. 21.

Under the theory of water rights as developed in the arid Western States the right to the use of running water may be acquired by the appropriation of individuals or corporations, and when the appropriation has been made for public use a landowner along the line of the canal may compel the delivery to him of water for irrigation, on payment of reasonable charges, as long as there is sufficient to supply prior appropriators. *Gould* v. *Maricopa Canal Co.* (1904) 8 Ariz. 429; see *Gerber* v. *Nampa etc. Irr. Dist.* (1908) 16 Idaho 1. There are two distinct views as to what constitutes a public use, and the right of each jurisdiction to determine its own test has been upheld by the Supreme Court. *Clark* v. *Nash* (1904) 198 U. S. 361. The California view, as decided in the principal case, seems to apply the usual test of holding out to serve the public generally, and lays no stress on the fact that an appropriation was made for purposes of irrigation. See *Leavitt* v. *Lassen Irr. Co.* (1909) 157 Cal. 82. The other and prevailing view is to the effect that, under the peculiar conditions existing in the arid States, the interest of the public in the development of agricultural land is sufficient to render any appropriation for irrigation a taking for public use. *Nash* v. *Clark* (1903) 27 Utah 158; *Ellinghouse* v. *Taylor* (1897) 19 Mont. 462; *Oury* v. *Goodwin* (1891) 3 Ariz. 255. Under this theory the facts of the principal case would justify the plaintiff's demand, and the test applied seems insufficient to meet the requirements of public policy in arid regions.

WATERS AND WATER-COURSES—LARCENY OF WATER DIVERTED FOR IRRIGATION.—The defendant raised a gate in a canal, from which the Government sold water diverted from a running stream, and allowed the water to flow out upon his land. He was indicted for larceny. *Held,* since the Government had control of the water, it was personal property, and the accused was guilty. *Chockalingam Pillai* (India 1912) 2 Mad. W. N. 219. See Notes, p. 251.